Dato' Seri Anwar bin Ibrahim v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–144 OF 2009(W), 05–145 OF 2009(W) AND 05–146 OF 2009(W)
ARIFIN ZAKARIA CJ (MALAYA), RAUS SHARIF AND ABDULL HAMID EMBONG FCJJ
29 JANUARY 2010

Criminal Procedure — Appeal — Trial judge's findings — Final order — Whether order of High Court under s 51/s 51A of the Criminal Procedure Code interlocutory or final order — Whether order appealable

Criminal Procedure — Disclosure of information — Documents — Obligation on prosecution to disclose to accused documents and facts before commencement of trial — Criminal Procedure Code s 51/s 51A — Whether s 51 to be read together with s 51A — Whether scope and purpose of s 51/s 51A limited to production of necessary or desirable documents or materials — Whether disclosure at pre trial stage confined to matters specified in charge and not for enabling preparation of defence

Criminal Procedure — Prosecution — Conduct of — Application under s 51/s 51A of the Criminal Procedure Code — Whether prosecution required to produce materials and information applied for — Whether disclosure at pre trial stage confined to matters specified in charge and not for enabling preparation of defence

The appellant was originally charged in the sessions court under s 377B of the Penal Code, to which he pleaded not guilty. He was alleged to have committed the offence against one Mohd Saiful Bukhari ('the complainant') on 26 June 2008 at Unit 11–5–1, Desa Damansara Condominium Bukit Damansara, Kuala Lumpur ('the condominium'). The case was then transferred to the High Court on a certificate under s 418A of the Criminal Procedure Code ('CPC'). The appellant filed an application by way of an originating motion under s 51 and/or s 51A of the CPC, for an order to compel the respondent and/or other persons having custody, care and control, to produce to the appellant, inter alia, the following materials: (i) the original CCTV recordings allegedly taken from the guardhouse and lifts in Block 11 of the condominium and any other locations fitted with CCTVs within the condominium; (ii) the original DNA samples, original swabs taken off the complainant, slides made during testing, pictures of the slides and the 'Electro Pherogram' for each sample; (iii) the notes of the chemists

who did the testing and analysis on the DNA samples; (iv) the doctors' notes, photographs and report of the proctoscopy or other tests done on the complainant; (v) the video recording of statement by the complainant; (vi) witness statements made under s 112 of the CPC; (vii) copies of all documents and items which would be produced by the respondent under s 51A(1)(b) of the CPC; (viii) a statement of facts favouring the appellant under s 51A(1)(c) of the CPC; (ix) all documents and items that will not be used by the respondent in the trial; (x) a list of the prosecution witnesses; and (xi) an order that the respondent disclose to him and/or that the appellant be allowed to inspect, all the documents and items mentioned above. The High Court allowed most parts of the appellant's application for the production of documents and materials applied for. The Court of Appeal however allowed the respondent's appeal against the whole order of the High Court. Hence, this appeal by the appellant. Learned counsel for the appellant first raised a preliminary objection saying that the matter now before the Federal Court was not appealable on the grounds that the decision by the trial court on the originating motion was merely a procedural ruling not affecting the rights of the parties, and that, that ruling did not finally dispose of the rights of the parties.

Held, overruling the preliminary objection and dismissing the appeal:

(1) The appellant's application to have access to the various materials was an exercise of the right given to him by s 51 of the CPC. The order made by the High Court in allowing access to some of the materials had, in effect, disposed of the rights of the appellant under s 51 of the CPC. It was not an interlocutory order, nor one that was made in the course of a trial. It stood on its own. Thus the order made by the learned judge on that application was a final order which was appealable (see paras 24–25).

(2) There is the legal requirement that the object or purpose of a statute should be promoted in interpreting any of its provision as provided in s 17A of the Interpretation Acts 1948 and 1967. To import the so called philosophy behind s 51A into s 51, in interpreting the latter section in a liberal fashion as was done by the High Court, would be losing sight of the object of s 51 (see paras 35–36).

(3) The object of s 51 is for a limited access. Its scope is restricted in law. Section 51 and s 51A are two separate and distinct provisions. Section 51A is a provision which imposes an obligation upon the prosecution to supply certain documents and materials. It has no connection to s 51 which gives the court a discretion to allow for discovery in specific instances. Hence, s 51A should not be used in interpreting s 51. Section 51 should thus be interpreted as it stands and taken to mean according

to its plain and ordinary meaning and not be differently read. Section 51 cannot be modified with the aid of the so called philosophy underlying the new s 51A. It was thus wrong for the learned judge to conclude that s 51A, had changed the mode of prosecution in a criminal trial, and in the process ignoring past precedents on its interpretation (see paras 36–37).

(4) Although the language in s 51 is seemingly wide it should not literally be taken to be capable of allowing for a wide ranging application as was allowed by the High Court in this case. Its scope is confined to the production of documents or materials which are 'necessary or desirable' for the purposes of the trial. And these two qualifications depends on which particular stage or point of time the application is made. If, as happened in this case, it was made at the pre trial stage, then the discovery must, be confined to the matters that were specified in the charge. This is so because the justice of the case would have been met if the appellant had been fully notified of the charge he faced. The charge in this case, was specific and was sufficiently particularised to accord the appellant a fair trial. Although, the appellant contended that what he required was essential and relevant to the preparation of his defence, at this stage, the defence was not yet a relevant consideration for the court hearing the application (see paras 45–46).

(5) One settled principle attached to the application for discovery under s 51 of the CPC is that, at this pre trial stage, a roving and fishing inquiry for evidence is not permissible. A catch all net cannot be cast. The appellant is not entitled to know by what means the prosecution proposes to prove the facts underlying the charge he faces. This remains the prerogative of the prosecution. The appellant had not met the dual requirements of necessity and desirability laid down in s 51 of the CPC (see paras 47–48).

[Bahasa Malaysia summary

Perayu pada asalnya dituduh di mahkamah sesyen di bawah s 377B Kanun Keseksaan, yang mana dia mengaku tidak bersalah. Dia telah dituduh melakukan kesalahan terhadap Mohd Saiful Bukhari ('pengadu') pada 26 Jun 2008 di Unit 11–5–1, Desa Damansara Condominium Bukit Damansara, Kuala Lumpur ('kondominium tersebut'). Kes itu kemudiannya dipindahkan ke Mahkamah Tinggi atas sijil di bawah s 418A Kanun Prosedur Jenayah ('KPJ'). Perayu memfailkan suatu permohonan melalui usul pemula di bawah s 51 dan/atau s 51A KPJ, untuk suatu perintah memaksa responden dan/atau orang lain yang mempunyai milikan, pemeliharaan dan kawalan, untuk mengemukakan kepada perayu, antara lain, barangan berikut: (i) rakaman asal CCTV yang dikatakan diambil daripada pondok pengawal dan lif Block

A 11 kondominium tersebut dan dari kawasan-kawasan lain yang dipasang dengan CCTV dalam kawasan kondominium tersebut; (ii) sampel-sampel asli DNA, spesimen-spesimen yang diambil daripada pengadu; (iii) nota-nota ahli kimia yang menjalankan ujian dan analisa ke atas sampel-sampel DNA; (iv) nota-nota doktor, gambar-gambar dan laporan proktoskopi atau lain-lain B ujian yang telah dijalankan ke atas pengadu; (v) rakaman video pernyataan pengadu; (vi) penyataan saksi-saksi yang dibuat di bawah s 112 KPJ; (vii) salinan kesemua dokumen dan item yang akan dikemukakan oleh responden di bawah s 51A(1)(b) KPJ; (viii) pernyataan fakta-fakta yang menyokong perayu di bawah s 51A(1)(c) KPJ; (ix) kesemua dokumen dan item yang tidak C digunakan oleh responden dalam perbicaraan; (x) senarai saksi-saksi pendakwaan; dan (xi) suatu perintah bahawa responden menzahirkan kepadanya dan/atau bahawa perayu dibenarkan memeriksa kesemua dokumen dan item yang dinyatakan di atas. Mahkamah Tinggi membenarkan hampir kesemua permohonan perayu bagi mengemukakan D dokumen dan material yang dipohon. Mahkamah Rayuan walau bagaimanapun membenarkan rayuan responden terhadap keseluruhan perintah Mahkamah Tinggi. Justeru, rayuan ini oleh perayu. Peguam yang bijaksana bagi pihak perayu mulanya membangkitkan bantahan awal menyatakan bahawa perkara tersebut yang kini di Mahkamah Persekutuan E tidak boleh dirayu atas dasar bahawa keputusan oleh mahkamah bicara atas usul pemula adalah keputusan prosedur yang tidak menjejaskan hak-hak pihak-pihak, dan bahawa keputusan tersebut tidak memutuskan hak pihak-pihak secara muktamad.

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Diputuskan, menolak bantahan awal dan rayuan:

(1) Permohonan perayu untuk akses kepada pelbagai material merupakan perlaksanaan haknya di bawah s 51 KPJ. Perintah yang dibuat oleh G Mahkamah Tinggi membenarkan akses kepada beberapa material, telah memberi kesan menafikan hak perayu di bawah s 51 KPJ. Perintah itu bukanlah perintah interlokutori atau dibuat semasa perbicaraan. Perintah tersebut adalah tersendiri. Oleh itu, perintah yang telah dibuat oleh hakim yang bijaksana atas permohonan tersebut adalah perintah H muktamad yang boleh dirayu (lihat perenggan 24–25).

(2) Ini merupakan kehendak perundangan bahawa objektif atau tujuan sesuatu statut seharusnya menggalakkan pentafsiran mana-mana peruntukannya seperti yang diperuntukkan di bawah s 17A Akta Tafsiran 1948 dan 1967. Untuk menggunapakai falsafah di sebalik I s 51A kepada s 51, dalam mentafsirkan s 51 secara liberal seperti yang dilakukan oleh Mahkamah Tinggi mengakibatkan objektif s 51 tersasar (lihat perenggan 35–36).

(3) Objektif s 51 memberi akses yang terhad. Skopnya disekat oleh undang-undang. Seksyen 51 dan s 51A merupakan dua seksyen yang berbeza dan berasingan. Seksyen 51A merupakan peruntukan yang mewajibkan pihak pendakwaan mengemukakan dokumen-dokumen dan material-material yang tertentu. Seksyen tersebut tiada kaitan dengan s 51 yang memberikan mahkamah budi bicara untuk membenarkan penzahiran dalam keadaan-keadaan tertentu. Maka, s 51A tidak harus digunakan apabila mentafsir s 51. Seksyen 51 harus ditafsir secara sendirinya dan ditafsir secara jelas dan biasa dan tidak harus dibaca sebaliknya. Seksyen 51 tidak boleh diubah dengan bantuan falsafah di sebalik s 51A yang baru. Maka adalah salah apabila hakim yang bijaksana memutuskan bahawa s 51A telah menukarkan aturan pendakwaan dalam kes jenayah, dan dalam proses itu, tidak mengendahkan tafsiran duluan (lihat perenggan 36–37).

(4) Walaupun ayat dalam s 51 kelihatan luas tetapi ia tidak seharusnya ditafsirkan secara harfiah bahawa peruntukan itu membenarkan jenis-jenis permohonan yang sangat luas seperti yang telah dibenarkan oleh Mahkamah Tinggi dalam kes ini. Skopnya terbatas kepada pengutaraan dokumen-dokumen atau material-material yang 'necessary or desirable' bagi tujuan perbicaraan. Kedua-dua syarat ini tertakluk kepada di peringkat mana atau pada masa-masa yang tertentu permohonan tersebut dibuat. Jika, seperti dalam kes ini, ia dibuat pada peringkat pra perbicaraan, maka penzahiran tersebut mestilah dihadkan kepada perkara-perkara yang dikhususkan dalam tuduhan. Ini kerana keadilan sesuatu kes akan tercapai jika perayu diberitahu sepenuhnya tuduhan yang dihadapinya. Tuduhan dalam kes ini adalah khusus dan diperincikan secukupnya bagi memberikan perbicaraan yang adil kepada perayu. Perayu menghujah bahawa apa yang dia perlukan ialah persiapan yang penting dan relevan bagi pembelaannya, tetapi pada peringkat ini, pembelaan bukanlah pertimbangan yang relevan bagi mahkamah yang mendengar permohonan tersebut (lihat perenggan 45–46).

(5) Satu prinsip tetap bagi permohonan penzahiran di bawah s 51 KPJ ialah, bahawa pada peringkat pra perbicaraan, siasatan yang bertujuan untuk menduga dan memancing tidak dibenarkan. Perayu tidak berhak untuk tahu cara pihak pendakwaan membuktikan fakta-fakta ke atas tuduhan yang dihadapinya. Ini adalah hak prerogatif pihak pendakwaan. Perayu tidak memenuhi kedua-dua kehendak keperluan dan kewajaran dalam s 51 KPJ (lihat perenggan 47–48).]

Notes

For a case on conduct of prosecution, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 2924.

For cases on documents, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1752–1757.

For cases on trial judge's findings, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 748–749.

Cases referred to

Ang Gin Lee v PP [1991] 1 MLJ 498, SC (refd)
Dato' Seri Anwar bin Ibrahim v PP [1999] 1 MLJ 321, CA (refd)
Duport Steels Ltd v Sirs [1980] 1 All ER 541, HL (refd)
Muzamil Izat Hashim v PP [2009] 2 CLJ 354, CA (refd)
Navaradnam v Suppiah Chettiar [1973] 1 MLJ 173, FC (refd)
PP v Hoo Chang Chwen [1962] MLJ 284, HC (refd)
PP v Mohd Fazil bin Awaludin [2009] 7 MLJ 741, HC
PP v RK Menon & Anor [1978] 2 MLJ 152, HC (refd)
PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj All v PP [1985] 2 MLJ 436, SC (folld)
PP v Raymond Chia Kim Chwee & Anor [1985] 2 MLJ 63, HC (refd)
Retnasara a/l Annarasa v PP [2008] 8 MLJ 608, HC (refd)
Rex v Bryant and Dickson (1946) 31 Cr App R 146 (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129, CA (refd)
Sjn Thomas a/l Manivello v Lt Kol Din Yati bin Dahlan & Ors [1998] 3 MLJ 329; [1998] 3 CLJ 76, CA (refd)
State of Orissa v Debendra Nath Padhi [2004] 4 LRI 860, SC (refd)
Vasudavan v T Damodaran & Anor [1981] 2 MLJ 150, FC (refd)
Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors [1995] 2 MLJ 709, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 50(1)
Criminal Procedure Code ss 418A, 51, 51A, 51A(1)(b), (1)(c), 107, 112, 152, 153, 154
Criminal Procedure Code [IND] s 91
Interpretation Acts 1948 and 1967 s 17A
Penal Code ss 377B, 467, 471

Appeal from: Criminal Appeal Nos W-09–71 of 2009 and W-09–74 of 2009 (Court of Appeal, Putrajaya)

Karpal Singh (SN Nair, Wan Anuar Shaddat (SN Nair & Partners) and Param Cumaraswamy (Param Cumaraswamy) with him) (Karpal Singh & Co) for the appellant.

Mohd Yusof bin Zainal Abiden (Nordin Hassan, Wan Mohamad Hanafiah bin Zakaria, Wong Chiang Kiat, Noorin Badaruddin and Farah Azlina Latif with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdull Hamid Embong FCJ (delivering judgment of the court):

BACKGROUND

[1] The appellant was originally charged in the sessions court on 7 August 2008 under s 377B of the Penal Code, to which he pleaded not guilty. He is alleged to have committed the offence against one Mohd Saiful Bukhari bin Azlan ('the complainant') on 26 June 2008 at Unit 11–5–1, Desa Damansara Condominium Bukit Damansara, Kuala Lumpur between 3.01 and 4pm.

[2] On 5 March 2009, his case was transferred to the High Court on a certificate under s 418A of the Criminal Procedure Code ('CPC') signed by the public prosecutor.

[3] Earlier, in the sessions court, the appellant had, through his counsel, made a number of requests to the respondent to have access to various documents and materials. Those requests were denied.

[4] Dissatisfied with the response, the appellant filed an application by way of an originating motion dated 10 June 2009 under s 51 and/or s 51A of the CPC, for an order to compel the respondent and/or other persons having custody, care and control, to produce to the appellant the following documents, materials and items:

(a) the original CCTV recordings allegedly taken from the guardhouse and lifts in Block 11 of Desa Damansara Condominium and any other locations fitted with CCTVs within the Condominium;

(b) DNA samples — the original samples, original swabs taken off the complainant, slides made during testing, pictures of the slides and the 'Electro Pherogram' for each sample;

(c) the notes of the chemists who did the testing and analysis on the DNA samples;

(d) the notes from all the doctors who examined the complainant at Hospital Kuala Lumpur;

(e) the doctors' notes, photographs and report of the proctoscopy or other tests done on the complainant at Hospital Kuala Lumpur;

(f) the report from Hospital Pusrawi and doctor's notes on the examination done on the complainant;

(g) the video recording of statement by the complainant on 30 June 2008;

(h) witness statements under s 112 of the CPC of:

(i) the complainant,

(ii) Hj Hassanudin Abdul Hamid,

(iii) Nursham,

(iv) Muhamad Rahimi bin Osman,

(v) Mohd Rasid Mohd Rosdi,

(vi) Dr Osman Abdul Hamid, and

(vii) any other witnesses not listed above.

(i) copies of all documents and items which will be produced by the respondent under s 51A(1)(b) of the CPC;

(j) a statement of facts favouring the appellant under s 51A(1)(c) of the CPC;

(k) all documents and items that will not be used by the respondent in the trial;

(l) a list of the prosecution witnesses; and

(m) alternatively, the appellant prayed for an order that the respondent to disclose to him and/or that the appellant be allowed to inspect, all the documents and items mentioned above.

[5] Since the application was filed, the respondent had provided the appellant with the following documents and materials:

(i) a CD with a copy of the alleged CCTV recording for 26 June 2008;

(ii) copies of the 'Electro Pherogram' of the alleged DNA samples tested;

(iii) notes from the doctor (as opposed to a report) from Pusrawi Hospital; and

(iv) a clearer copy of the appellant's statement.

ORDER OF THE HIGH COURT

[6] The High Court allowed most parts of the appellant's application for the production of documents and materials applied for, except for the production of CCTV recordings at other locations within the Desa Damansara Condominium, the original DNA samples and the statements under s 112 of the CPC of other witnesses not named by the appellant. The High Court also allowed copies of all documents to be produced as evidence by the prosecution to be supplied to the appellant pursuant to s 51A(1)(b) of the CPC. Also granted is the statement of facts favourable to the defence under s 51A(1)(c) of the CPC.

[7] With regard to the production of the 'Electro Pherogram' on certain identified samples, the High Court made no order on the said items since they had already been supplied to the appellant. No order was also made in respect of the video recording of the complainant's statement since the appellant was given his s 112 statement.

[8] Being dissatisfied with the said order, the respondent filed an appeal against the whole order of the High Court vide Criminal Appeal No W-09–71 of 2009.

[9] The appellant had also filed an appeal against part of the order vide Criminal Appeal No W-09–74 of 2009.

DECISION OF THE COURT OF APPEAL

[10] The Court of Appeal overruled the findings of the trial judge and, except for the orders made under s 51A(1)(b) and (c) of the CPC, set aside all the orders made by the court below in compelling the production of most of the documents and materials requested by the appellant in his originating motion. The reason given by the Court of Appeal is found in this concluding passage:

> For the reasons given above we are of the view that the learned judge erred in law in not observing the judicial precedents with regard to the interpretation of s 51 of the Code in exercising his discretion. The High Court, like the Court of Appeal, is bound by all judgments of the apex court and it must apply the law as stated therein.

PRELIMINARY OBJECTION

[11] Learned counsel for the appellant first raised a preliminary objection saying that the matter now before us, is not appealable. This court is thus not competent to hear this appeal.

[12] The reasons advanced by learned counsel on this preliminary issue is that, the decision by the trial court on this originating motion is merely a procedural ruling not affecting the rights of the parties, and that, that ruling did not finally dispose of the rights of the parties citing *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129. Mr Karpal Singh also argued that the appellant's actual 'rights' for the court's determination is whether the appellant was innocent or guilty of the charge facing him. Our attention was brought to s 50(1) of the Courts of Judicature Act 1964 ('CJA') and s 3 of the same Act which respectively state:

A Section 50(1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court.

Section 3 Decision means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[13] He also read from the explanatory statement of the Bill to emphasise the rationale of s 3. The particular passage referred to states:

At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This causes a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts.

[14] It is clear therefore that the purpose of putting in place the amended s 3 of the CJA is to avoid long delays in trials due to appeals filed on interlocutory rulings made by the court in ongoing trials. This same concern had been expressed by judges before, long before the introduction of the current definition of the word 'decision' in s 3 of the CJA (see eg *Public Prosecutor v Hoo Chang Chwen* [1962] MLJ 284 and *Public Prosecutor v RK Menon & Anor* [1978] 2 MLJ 152).

[15] It was also submitted that the decision made by the trial judge was a ruling made in the course of a trial even though the trial proper has not yet commenced. This is because the charge had been read to the appellant and his plea taken. The case of *Sjn Thomas a/l Manivello v Lt Kol Din Yati bin Dahlan & Ors* [1998] 3 MLJ 329; [1998] 3 CLJ 76 was cited supporting this proposition. Thus, he said, this ruling was one made under s 3 of the CJA, and so not appealable.

[16] The case of *Ang Gin Lee v Public Prosecutor* [1991] 1 MLJ 498 was also referred to us to support the proposition that only a decision that is final in its effect may be appealed against and that this principle was in place even before the amendment to the word 'decision' in s 3 of the CJA, which came into effect on 1 August 1988.

[17] In his response to the preliminary objection, learned solicitor general II submitted that the application by the appellant was a matter independent

of the trial. As such the order made by the learned judge on that application was an order not made in the course of a trial to be caught by the definition of 'decision' in s 3 of the CJA.

[18] In his opposing submission, he referred us to three decisions. First he cited this passage from *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321, stating:

> In other words, what has been excluded from the meaning of the word 'decision' is the type of judgments and orders which is termed 'interlocutory' by *Halsbury's Laws of England* (4th Ed) para 506 at p 240, which read:
>
> > Interlocutory judgments and orders. An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and give no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment and merely directs how declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'.

[19] Next, the passage from the Supreme Court's decision in *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj All v Public Prosecutor* [1985] 2 MLJ 436, stating:

> With regard to the first question, under s 307(i) of the Criminal Procedure Code any person dissatisfied with any judgment, sentence or order pronounced by any magistrates' court in a criminal case to which he is a party may appeal to the High Court against any such judgment, sentence or order. The word 'order' is preceded by the words 'judgment' and 'sentence'. *The order must therefore be a final order in the sense that it is final in its effect* as in the case of a judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties. See some discussion on this point in *Mohamed Amin Bros v Government of India* AIR (1950) FC 77 in respect of civil suits. The right of a person to ask for a document or other material in a criminal proceeding under s 51 of the Criminal Procedure Code is a right exercisable at the discretion of the court. *Thus a decision or order to issue a summons under s 51 of the Criminal Procedure Code is a final order in the sense that it is final in its effect and therefore appealable under s 307(i) of the Criminal Procedure Code*. (Emphasis added.)

Raymond Chia, although a pre s 3 of the CJA decision, is directly on the point of whether a decision made pursuant to a s 51 of the CPC application is a final decision, which is thus appealable.

[20] Finally, also cited was the Court of Appeal's case in *Muzamil Izat Hashim v Public Prosecutor* [2009] 2 CLJ 354 which followed the decision in *Raymond Chia*.

[21] Learned solicitor general II concluded that the order of the High Court was indeed a final order which is appealable. He added that if the respondent is deprived of an immediate appeal, the appellant, pursuant to the High Court order would be supplied or be allowed to inspect the various documents and materials he had applied for, and this would render nugatory any future appeal by the respondent which can be made only after the conclusion of the trial.

[22] Having considered the respective stands taken by both parties we are constrained to overrule this preliminary objection.

[23] Section 51 of the CPC gives the appellant certain rights. These 'rights', in our view, are the rights referred to under s 3 of the CJA. The application by the appellant to have access to the various documents and materials is in fact an exercise of that right given to him by s 51 of the CPC which says:

> 51 Summons to produce document or other things.
>
> (1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.
>
> (2) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes the property or document to be produced instead of attending personally to produce the same.
>
> (3) Nothing in this section shall be deemed to affect the provisions of any law relating for the time being in force or to apply to any postal article, telegram or other document in the custody of the postal or telegraph authorities.

The order made by the High Court in allowing access to some of the documents and materials has, in effect, disposed of the rights of the appellant under s 51 of the CPC. It is not an interlocutory order, nor one that was made in the course of a trial. It stands on its own.

[24] Further, the application made by the appellant stands independently of the trial. It sought for a determination of the appellant's right pursuant to s 51 of the CPC. Thus the order made by the learned judge on that application is a final order that has finally disposed of the rights of the

appellant. It has disposed of the matter in dispute. It is therefore appealable. We therefore affirm this part of the judgment of the Court of Appeal dated 6 November 2009.

CORE ISSUE

[25] We now turn to the second limb in the arguments which is the substance of this appeal. This turns on the question of whether the High Court was correct in supplying the various documents and materials sought for by the appellant.

[26] Although the originating motion filed by the appellant is premised on both s 51 and s 51A of the CPC, we find that, after analysing the reasons given by the learned judge, in essence the order made was based on s 51 of the CPC, except for the two orders made pursuant to s 51A(1)(b) and s 51A(1)(c) of the CPC, which are not in issue in this appeal.

[27] In the context of this appeal, s 51 of the CPC provides that when any court considers that the production of any document is necessary or desirable for the purposes of any trial, such court may issue a summons to the prosecution who is in possession of such documents.

[28] Section 51A of the CPC (A 1274/06) is new. It provides for a mandatory obligation on the part of the prosecution to supply to an accused person the first information report made under s 107 of the CPC, a copy of any document which would be part of the prosecution's case and any statements of facts favourable to the defence, (with a safeguard on public interest consideration). That section is now reproduced in full. It says:

51A Delivery of certain documents

(1) The prosecution shall before the commencement of the trial deliver to the accused the following document:

(a) a copy of the information made under section 107 relating to the commission of the offence to which the accused is charged, if any;

(b) a copy of any document which would be tendered as part of the evidence for the prosecution; and

(c) a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.

(2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.

[29] The High Court in allowing most of what the appellant asked for took into consideration both s 51 and s 51A together. The learned judge then addressed his mind on the philosophy underlying s 51A which in his view had changed the prosecutorial process to be one more transparent and fair in accordance with the circumstances of the case. In summary, the learned judge in arriving at his decision, relied on the following basis, viz:

(a) To allow access to prosecution materials so that the appellant would know the case against him in advance to better prepare his defence.

(b) To allow the appellant to prepare rebuttal evidence.

(c) To enable the appellant to prepare cross-examination.

(d) To avoid postponement.

[30] The learned judge relied on a High Court decision in *Retnasara a/l Annarasa v Public Prosecutor* [2008] 8 MLJ 608 where it was opined that s 51 should not be read in isolation but in tandem with s 51A of the CPC. It was also held in that case that with the new s 51A in place, previous cases decided on the issue of disclosure of information and documents would no longer be applicable.

[31] The Court of Appeal hearing this instant appeal rejected this approach as disclosed in these passages:

> It is obvious from the judgment of the learned judge in the instant case that he was in agreement with the decision of the High Court in *Retnasara*'s case. The learned judge disregarded the decisions of the apex court on the interpretation of s 51 of the Code. In fact this was the main complaint by the public prosecutor.
>
> With due respect, we were unable to agree with the decision of the learned judge. In our view the decision of the apex court in *Raymond Chia*'s case and *Husdi*'s case are relevant and applicable in respect of the application for documents not specifically mentioned in s 51A of the Code. In this connection we agree with the submission of learned solicitor general that the law on the application of s 51 had not changed notwithstanding the inclusion of the new s 51A of the Code.

[32] Was the learned judge correct in invoking the so-called philosophy underlying the new s 51A into the interpretation of s 51 of the CPC and in so doing to ignore the established principles laid down by the apex court in *Raymond Chia*?

[33] Prima facie, the meaning of any piece of legislation is to be given a literal meaning or grammatical meaning where the meaning is plain and clear. And this can be arrived at without consideration of other interpretative criteria. Parliament must be taken to mean what it says. The court in

interpreting statutes must not be seen to be splitting hairs or producing any inconsistency or absurdity (see Bennion on *Statutory Interpretation* (5th Ed).

[34] Then there is the legal requirement that the object or purpose of a statute should be promoted in interpreting of any of its provision as provided in s 17A of the Interpretation Acts 1948 and 1967, which states:

> 17A In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[35] Thus, to import the so called philosophy behind s 51A into s 51, in interpreting the latter section in a liberal fashion as was done by the High Court, would be losing sight of the object of s 51. It will be seen later in this judgment that the object of s 51 is for a limited access. Its scope is restricted in law. In our view the High Court had erred in law in adopting the above approach. By so doing he had in effect expanded s 51 of the CPC and had effectively changed the law. Changes in the law is for Parliament to decide, not the judiciary. Judges interpret the law. And judges, 'under the guise of interpretation should not provide their own preferred amendments to statutes' (per Lord Diplock in *Duport Steels Ltd v Sirs* [1980] 1 All ER 541 (HL)). Also, 'a liberal interpretation dictated by sympathy is only permissible where the words or phrase in question may fairly be considered ambiguous'. (per Ong CJ in *Navaradnam v Suppiah Chettiar* [1973] 1 MLJ 173).

[36] In our view the learned judge was also wrong to say that earlier cases decided on s 51 are no longer applicable. Having considered both sections, we agree with the Court of Appeal that s 51 and s 51A are two separate and distinct provisions. Section 51A is a provision which imposes an obligation upon the prosecution to supply certain documents and materials. It has no connection to s 51 which gives the court a discretion to allow for discovery in specific instances. Hence, s 51A should not be used in interpreting s 51. Section 51 should thus be interpreted as it stands and taken to mean according to its plain and ordinary meaning and not be differently read. Thus, s 51 cannot now be modified with the aid of the so called philosophy underlying the new s 51A, even if such a philosophy did exist. It is thus wrong for the learned judge to conclude that s 51A, had changed the mode of prosecution in a criminal trial, and in the process ignoring past precedents on its interpretation.

[37] Learned solicitor general II in concluding his submission on s 51 of the CPC had stated that:

A The court would exercise its discretion under section 51 of the Code only if the court is of the view that it is necessary or desirable to have the document produced, having regards to sections 152 to 154 of the Code at the *pre trial stage*, whereas the court must subject the application to the relevancy test, having regards to the issues for adjudication *in the course of the trial*. (Emphasis added.)

B

[38] In coming to that conclusion reference was made to the discussion on the Indian s 91 Code of Criminal Procedure 1973 (equivalent to s 51 of the CPC) in the case of *State of Orissa v Debendra Nath Padhi* [2004] 4 LRI 860, and the following passages were read to us:

C

Any document or thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. *If any document is necessary or desirable for the defence of the accused, the question of invoking s 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage*. (Emphasis added.)

D

E The next passage reads:

In so far as the accused is concerned, his entitlement to seek order under s 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or the accused.

F

[39] Both counsel had also relied on the Supreme Court decision in G *Raymond Chia*. In that case both accused persons were jointly charged with forgery under s 467 and s 471 of the Penal Code. The accused persons applied for various documents, including five documents mentioned in the charge in the possession of the prosecution, for their inspection. At the intermediate appeal in the High Court it was held that the application by the H accused Raymond Chia was too general in terms and in the case of the accused Zainal too all-embracing to fall under s 51. As such the learned president of the sessions court should not have exercised his discretion in granting the order to partially allow for the discovery.

I **[40]** On further appeal to the Supreme Court, it was held that the court has a discretion to supply the documents asked for by an accused person. However, if the application is made before the commencement of the trial, the documents or materials to be supplied are confined to those only specified or referred to in the charge. A general demand should not be entertained. If

the application is made in the course of a trial, the court needs to consider that the documents and materials asked for must be relevant to the issues for adjudication. The Supreme Court also held that the accused was not entitled to have access to things which were evidence that the prosecution proposed to prove the charge. One overriding principle expressed by the Supreme Court which we need to mention is that in exercising its discretion the court would need to consider the justice of the case and at what stage of the proceedings the application for discovery was made. The principle of justice was made in reference to the duty imposed upon the prosecution to sufficiently particularise the charge having regard to s 152, s 153 and s 154 of the CPC when the court is asked to exercise its discretion under s 51 of the CPC at the pre trial stage. The Supreme Court said:

> The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre trial discovery and inspection of documents in a civil proceeding. The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied. The principle of justice was in fact emphasised by Hepworth J in *Public Prosecutor v Teoh Choon Teck* at p 35 when he said:
>
> > If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may.

The qualification, however, is also stated by the learned judge in the same page with which we respectfully agree:

> It will be observed that nowhere do ss 162, 163 and 164 say that the accused person is entitled to know the means by which the prosecution proposes to prove the facts alleged in the charge.

[41] Even when the discretion is to be exercised in favour of the application the Supreme Court cautioned against a carte blance exercise of the discretion to allow that access to discovery and production before the trial as if it were a pre trial discovery in a civil case. In other words so long as the accused is given sufficient notice of the charge against him, the law is satisfied.

[42] Learned counsel for the appellant contended that in this case, the trial has begun upon the reading of the charge to the appellant although it has yet to commence in the sense that no witness has yet given evidence. He cited *Sjn Thomas Manivello* and to this passage in support:

> A trial begins when the charge is read to the accused and his plea taken, but it only commences at the trial proper ie when the prosecution calls its first witness.

Thus he said, the order made by the learned judge here was after the beginning of the trial. We are unable to agree with this contention. In our view, what is meant by the phrase 'in the course of the trial' in *Raymond Chia* must mean that the trial proper has commenced or taken off in the sense that evidence has been led by the calling of witnesses. That phrase could not merely mean at the stage of only having the charge read to an accused person. The trial must have been in progress.

[43] In the context of the principles laid down in *Raymond Chia*, this stand taken by Mr Karpal Singh with respect, is therefore wrong. In our considered view the application for discovery by the appellant was still one made at a pre-trial stage and not one made 'in the course of the trial'. At this stage, according to *Raymond Chia*, with which we agree, the appellant would only be entitled to those documents and materials pertaining to the charge, for him to understand the charge and prepare his defence.

[44] Learned counsel for the appellant then urged us to depart from *Raymond Chia*. We find no justification to do so. We have looked at the authorities presented to us during arguments, including those from India and Singapore and found them united in their holding that s 51 must necessarily operate within certain inbuilt limitations. Although the language in that section is seemingly wide it should not literally be taken to be capable of allowing for a wide ranging application as was allowed by the High Court in this case. Its scope, according to all the authorities that we have read, is confined to the production of documents or materials which are 'necessary or desirable' for the purposes of the trial. And these two qualifications depends on which particular stage or point of time the application was made. If, as happened in this case, it was made at the pre-trial stage, then the discovery must, according to the principles we have alluded to earlier, be confined to the matters that are specified in the charge. This is so because the justice of the case would have been met if the appellant had been fully notified of the charge he faces. He cannot then be said to be at any disadvantage to prepare his defence. At this stage, the documents and materials that the court may compel production are confined to those that are necessary and desirable to the trial. And the charge in this case, in our view, is specific and is sufficiently particularised to accord the appellant a fair trial. Put another way, the requirement of justice as envisaged by the Supreme Court in *Raymond Chia* has, in this case, been met, sans the discovery of those documents and materials.

[45] Now, the appellant contends that what he required was essential and relevant to the preparation of his defence. But at this stage, the defence is not yet a relevant consideration for the court hearing this application. The

appellant's application should not be turned into a mini trial to determine his defence on the charge (see *State of Orissa v Debendra Nath Padhi*). A

[46] The appellant cannot say at this stage that his defence is going to be so and so and that he needs to have access to such and such documents and materials to prepare for the defence. One settled principle attached to the application for discovery under s 51 of the CPC is that, at this pre trial stage, a roving and fishing inquiry for evidence is not permissible. A catch all net cannot be cast. The appellant is not entitled to know by what means the prosecution proposes to prove the facts underlying the charge he faces. This remains the prerogative of the prosecution. Mohd Azmi J, at the intermediate appeal in *Public Prosecutor v Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 63, described this situation neatly in this manner: B C

> The important thing is to keep a proper balance between the right of the accused to know exactly what the charge is against him so as to give him reasonable opportunity to prepare his defence, and the right of the prosecution not to disclose their evidence and the manner in which they are to prove their case before trial in order to sustain our adversary system of criminal justice. To what extent the right of the prosecution not to disclose documents specifically referred to in the charge before trial is qualified by the right of the accused to be given reasonable opportunity to prepare his defence is of crucial importance in the administration of criminal justice. D E

[47] In our view, the appellant has thus not met the dual requirements of necessity and desirability laid down in s 51 of the CPC. We concur with the finding of the Court of Appeal on this issue. F

[48] We are conscious that the orders made by the learned trial judge were in the exercise of his discretion. The phrase 'may issue a summons' clearly expresses this discretion given to the court. Mr Karpal Singh referred us to the case of *Vasudavan v T Damodaran & Anor* [1981] 2 MLJ 150 in support of the principle that an appellate court should not disturb any decision made in the proper exercise of a judge's discretion. We agree that this is a settled principle. Only that there are qualifications. Some of which are that any exercise of discretion based on an error of law or a wrong principle or irrelevant consideration or which resulted in a miscarriage of justice may be reversed by an appellate court (see Federal Court case of *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709). In our considered view this is exactly what has happened in this case. The learned judge here had passed over settled principles and took into consideration irrelevant matters as the basis of his decision. He had thus improperly exercised that discretion. The Court of Appeal was not wrong to hold that the discretion had not been judicially exercised by the learned judge. We thus affirm the Court of Appeal's findings. G H I

[49] At the close of arguments, learned assisting counsel for the appellant, Dato Param Cumaraswamy, called our attention to a document called the 'General Comment No. 32 of the UN Human Rights Committee, 19th Sessions'. We were reminded of the rights to equality before the courts and to a person's right to a fair trial. One feature found in that document is the provision on 'adequate facilities' to be given to an accused person. This includes access to documents and other evidence, including materials that the prosecution *plans to offer in court against the accused* (see para 33). (Emphasis added.)

[50] The right to a fair trial is of course a universal principle. It is inviolable. It has since been fully developed in the common law practice including here, in Malaysia. This was emphasised very recently in our High Court through the words of Mohd Zawawi JC in *Public Prosecutor v Mohd Fazil bin Awaludin* [2009] 7 MLJ 741 at p 747, which we wholly approve. The learned JC said this:

> The principle of a fair trial is sacrosanct in all civilised legal jurisdictions. It is a principle of universal application. In Malaysia the principle of fair trial and fairness have been long-established and recognized in several decisions. Some of these include *Cheak Yoke Thong v Public Prosecutor* [1984] 1 MLJ 311 and *Azahan bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334; [2004] 6 AMR 810.

However, it must be stressed that there are fundamental safeguards built into the law to guarantee equality and fairness in a trial. For this appeal, we have mentioned this earlier in our discussion on discovery under s 51 of the CPC. It needs also be stated that these safeguards are to be examined against the primary consideration that the prosecution's duty is to prosecute not to defend (see Lord Goddard CJ's remarks in *Rex v Bryant and Dickson* (1946) 31 Cr App R 146).

[51] Now, the words 'plans to offer in court against the accused' which we underscored above have, we think, been put in place when Parliament added s 51A to the CPC. We need to repeat here s 51A(1)(b) which says:

> (1) The prosecution shall before the commencement of the trial deliver to the accused:
>
> (a) A copy of any document which would be tendered as part of the evidence of the prosecution;

In our view, this new provision strengthens the guarantee of a fair trial in providing the adequate facilities as purported in the general remarks document of the Human Rights Committee that was read to us. Section 51A of the CPC has, in our opinion, made the battlefield move level, to preserve

the 'equality of arms principle', ensure the fairness of a trial and ultimately uphold the very integrity of the courts in its administration of criminal justice. This should also be considered in the light of our criminal justice system where the burden of proof lies throughout on the prosecution, which, together with the common law principle of presumption of innocence, safeguard that fairness.

[52] For these reasons, we dismiss this appeal and uphold all the findings of the Court of Appeal.

Preliminary objection overruled and appeal dismissed.

Reported by Kanesh Sundrum